

Testimony on SB 94 as Amended

Association of Gallatin Agricultural Irrigators (AGAI) – Krista Lee Evans

Senate Natural Resources 2/13/09

SENATE NATURAL RESOURCES
EXHIBIT NO. 2
DATE Feb. 13, 2009
BILL NO. SB 94

AGAI supports SB 94 as amended.

PASSAGE OF SB 94 AS AMENDED, IS NECESSARY TO PROTECT SENIOR WATER RIGHT HOLDERS FROM THE UNDUE BURDEN OF ATTORNEY FEES AND OTHER COSTS ASSOCIATED WITH AN ACTION OVER WHICH THEY HAVE NO CONTROL AND MUST BE A PARTY IN ORDER TO DEFEND THEIR CONSTITUTIONALLY PROTECTED PROPERTY RIGHT.

In its testimony in the first hearing on SB 94, while SB 94 did have good components, AGAI opposed the bill because of the substantial amendments to the statutes that resulted from passage of HB 831(2007). AGAI feels that it is critical to keep the specific requirements in statute so that both applicants and objectors are fully aware of what is expected in a water right application in a closed basin. The amendments to SB 94 address all of our concerns with regard to our initial testimony.

The most important reason to pass SB 94 as amended is the removal of the words "historic beneficial use" in 85-2-260(6). Under current law, the DNRC would be required to look at EVERY water right that MAY be adversely affected as the result of a new appropriation. There are a number of reasons why that is a bad thing and why that language needs to be stricken from statute in SB 94. These reasons are:

1. The determination of historic beneficial use is strictly the Montana Water Court's jurisdiction and it is inappropriate and unfair to give that power to DNRC;
2. HB 831 put the burden of cost and proof firmly on the applicant. With "historic beneficial use" in statute, a water right holder, regardless of whether they objected to the new water right application or not is going to have to be involved in the process in order to protect their property right. This shifts the cost burden away from the applicant and onto the senior water right holders and objectors.
3. There is no current process for senior water right holders that are not objectors to an application for a new water right to protect their interest without being an objector. To date that has not been an issue because the department used the water right as claimed, decreed, or permitted to base its decision on adverse affect – with the use of the term "historic beneficial use" in statute that is no longer the case. The department will be required to analyze every water right to the extent of calculating and determining historic beneficial use which would most likely include analyzing consumptive use for each water right historically.
4. The DNRC has been under constant pressure and scrutiny to improve the permitting process and make their decisions more timely. If the DNRC is required to analyze every water right based on historic beneficial use the permitting process will be much more burdensome for the department and for applicants and the process will be much longer and much less timely.

For these reasons we respectfully request that you pass SB 94 as amended to make Montana's water rights process more fair and more efficient without placing an undue burden on those entities trying to protect their Constitutionally guaranteed property right.